No. .....

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

LOCKE MILLER,
Petitioner,

vs.

MICHAEL J. KIRWAN,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

OPINION OF THE COURT BELOW

The opinion of the Supreme Court was embodied in the entries made a part of the record as attached to this Brief (p.291-293R), and (p.——Appendix).

II

JURISDICTION

1. The statutory provisions under which petitioner invokes the jurisdiction of this Court on the record and admitted facts is as follows:—

Act of February 13, 1925, Chapter 229, 42 Stat. 936 effective May 13, 1925, Section 237 (b):

> "It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a state in which a decision could be had where is drawn in question the validity of a statute of any State on the Ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute, or of commission held or authority exercised under the United States, and the power to review under this paragraph may be exercised as well where the federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph, nor shall the fact that a review on a writ of error might be obtained under the preceeding paragraph be an obstacle to granting a review on certiorari under this paragraph."

2. The date of the final judgment to be reviewed here was rendered October 9, 1940, as stated on page 1 petition herein.

3. The facts are all set out in the petition and "summary statement of matter involved." Pages 1 to 3 inclusive, petition herein.

4. The petition herein is filed on the —— day of ————, 1940.

5. Cases sustaining jurisdiction.

Murdock vs. Memphis, 20 Wall, 590-628; *Osborne vs. Bank* 9 Wheat 738, 822-825; *Cohens vs. Va.,* 6 Wheat 264, 379; *Caldwell vs. Texas* 137, U. S. 692, 697; *Bank vs. Oaklay,* 4 Wheaton 235, 244; 232 U. S. 236, 242, 243, *Miedich vs. Lowenstein; Manhattan Ins. Co. vs. Cohen* 234, U. S. 123, 134.

III

STATEMENT OF CASE

The case is fully stated in the petition, (p. 2).

IV

The Question presented is stated on p. 4, Petition.

V

ARGUMENT

The Petition shows that under Rule XX (Appendix) the decision of Judge Weygandt (p. 291 R) rendered September 20, 1940 became final October 9, 1940. (p. 292 R).

It will also be noted in the Petition herein that the Federal Rights were specially set up at the hearing (p. 3 petition) which proceeded without giving the contestant therein an opportunity to produce in full, by additional depositions, evidence material to his claims (p. 3 petition).

The acts enjoined by Sec. 4785-166 to 4785-173 inclusive General Code of Ohio (pp. 20 to 24 Appendix) and the Sub-Section 173 thereof, permitting additional depositions, were adopted, manifestly in the interests of the public and of individual rights requiring its exercise and were therefore mandatory.

It certainly is of the most fundamental and vital interest to the people of Ohio and the people nationally, and to the Rights of any opposing candidate, that elections or nominations for Congressional offices be kept pure and that candidates therefore, or members of Congress who

become candidates therefore, observe strictly the letter and spirit of all laws relating thereto.

The sections Title 18 (p. 17 et se. Appendix) Federal Code show that it was the intent of Congress and the People that no one should hold or be a candidate, or be eligible to hold office or become a candidate for a seat in the House of Representatives, if he knowingly and deliberately did the things prohibited by said sections.

If he was not qualified to hold such office, certainly he was not qualified to become a candidate therefore and put the people to that expense, the result of which would leave the people without fair and honest representation as contemplated by the acts of Congress itself. The Contestant contends the testimony taken, coupled with the depositions sought, but denied, would establish conclusively that Kirwan was ineligible to become a candidate for that High Office. The testimony taken is to be found on pp. 13—to—267.

Supervisors vs. U. S. 4 Wall (U. S.) 435.

p. 446. *"Where power is given by statute to public officers in permissive language, as that, they may, if deemed advisable, do a certain thing, the language used will be regarded as peremptory, where the public interests or individual rights require that that it should be."*

p. 447. *"This power is placed with the depository to meet the demands of right and to prevent a failure of justice.* It is given as a remedy to those entitled to invoke its aid, and who otherwise would be remediless."

"In such cases it is held that the intent of the legislature which is the test was not to devolve a mere discretion, but to impose a positive and absolute duty."

State ex rel vs. Bowers 26, O.C.C. 326 (16 O.C.D.) (Aff. 70, O.S. 423).

p. 341. *"The rule is that where power is given to public officers as given* the council in *Sec. 135* of the Municipal Code, or in equivalent language, *whenever the public interests calls for its exercise, the duty to so exercise the power is peremptory. In all such cases the intent of the legislature, which in the test, is not to devolve a mere discretion, but to impose a positive and absolute duty. Rock Island (supvrs.) vs. U. S.* 71, U. S. (4 Wall) 435, 446, 447.

State ex rel vs. Bish, 12 O. N. P. (N.S.) 360; 22, O. D. (N.P.) 480, 495, 496.

"Where power is given to public officers by act of the legislature, whenever the public interests or individual rights call for its exercise, the language used, though permissive in form, is in fact peremptory and permits of no discretion." Rock Island (Superv.) vs. U. S. 71, U. S. (4 wall), 435, 445, 446, 447; **Mason vs. Hearson*, 50 U. S. (9 How.) 249, 259; *Mayor vs. Furze* 3 Hill (N.Y.) 612; *Newburgh vs. Miller*, 5 John's Ch. (N.Y.) 100.

See also *State ex rel vs. Bd. of Ed.* 8, O. N. O. 186; 11, O. D. (N.P.) 422, Cyc. 36, p. 1159 (44 Cent. Ant. Dig. Statutes, Sec. 308).

It must be clear therefore when the motion and affidavit of Miller (p. 265 R) was filed 19 day of Aug including the affidavit filed the 4.9 day of Aug., in support thereof (p. 270. 279. R), that the duty became mandatory on the part of Judge Weygandt to grant a continuance of the hearing and the allowance of the order for the taking of such additional depositions. To deny this Right when such Right was specially set up, is a denial of a Federal Right. That Federal Right was set up (p. 3, 4, Petition) herein and (p.——R) application for re-hearing.

Due Process.

Jensen vs. Union Pac. Ry. 6, Utah 253, 256. 21 Pac 294.

"Each party has a right to introduce evidence to establish his right to recover, on the one hand, and to establish his defense upon the part of the other, after which comes judgment. Any judgment which is rendered without these modes of procedure, or in disregard of them is not due process of law. Any other procedure condemns before it hears, does not proceed upon inquiry, but renders judgment before trial."

Brown vs. Hammell, 6 Pa. 86, 47 Amer. Dec. 431; *Zeigler vs. South, etc. Ry. Co.* 58, Ala. 594, 599, quoting 40 Neb. 64, 75; 58 N. W. 543.

"Due process of law implies the right of the person affected thereby, to be present before the tribunal which pronounces judgment, upon the question of life, liberty, or property, in its most comprehensive sense; to be heard, by testimony or otherwise, and to have the right of controverting by proof, every material fact which bears on the question of right in the matter involved. If any question of fact or liability be conclusively presumed against him, this is not due process of law."

Saunders vs. Shaw, 244, U.S. 317.

"It is a violation of due process of law to deny a litigant an opportunity to introduce his evidence."

The above case arose upon the action of the supreme court in disposing of a case without giving the party an opportunity to present his evidence.

When the supreme court of Ohio or Judge Weygandt denied that motion and application and continuance, he, in effect and as a necessary result, denied the federal right thus set up.

That this case, on the record, was a case arising under the constitution, and the laws of the United States (Title 18, p. 17 et se. Appendix) as well as the laws of Ohio, (4785-

166, etc. Gen. Code, Ohio p. 20 et se. Appendix) guaranteeing and constituting due process is clear from the following cases.

6 Wheaton 264, 379 *Cohen vs. Va.*

"A case arises under the constitution or laws of the United States, when its correct decision depends upon the construction of either. See also Osborne vs. Bk. 8 Wheat. 738, 822, 825.

Caldwell vs. Tex. 137, U. S. 692, 697.

"Law in its regular course of administration through courts of justice, is due process, and when secured by the laws of the State, the constitutional requisition is satisfied. 2 Kent laws 13. And Due process is so secured by laws operating for all alike, and not subjecting the individual to the arbitary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. *Bank Col. vs. Oaklay,* 4 Wheat 235, 244. The power of the state must be exerted within the limits of these principles and its exertion cannot be sustained when special, partial, and arbitrary. *Hurtado vs. Col.* 110, U. S. 516, 535."

20 Wall (U.S.) 590, 628, *Murdock vs. Memphis.*

"If it appears from the record that the plaintiff in error presented to the Court** by appropriate method, one of the questions specified in the statute, and the court ruled against him, the jurisdiction of this Court attached, and we must hear the case on its merits."

"These merits have been held to be, to determine whether the propositions of law involved in the specific federal question were rightly decided, and if not, did the case of the platiff in error on the pleadings and evidence, come within the principle ruled by this Court. This has always been held to be the exer-

cise of the jurisdiction, and re-examination of the case provided by the statute."

It is the settled law in Ohio, and not over-ruled, that statutes relating to the right and ability to hold office reach back to the question of eligibility to become a candidate for that office. That must be the effect of the words which follow.

Prentiss vs. Dittmer, 93 O. S. 314.

"1. An offer by a candidate for common pleas judge, made for the purpose of effecting his election to office, that in the event of his election he will accept for his judicial services only the stipulated salary payable by the state, and that he will accept nothing that may be due and payable to him from the local or county treasury, is against public policy and an offense within the preview of Section 5176-26 General Code, which, if proven, invalidates his election.

"2. By virtue of that section, such an offense may be set forth has a ground of contest within the terms of Section 5138, General Code, *and it is not necessary to prove, in such election contest based on that sole ground, that a sufficient number of voters were so influenced by such offer as to change the election result.*

"4. Elections and election contests are controlled by specific sections of the Ohio constitution. The grant of legislative power for their control is absolute, and under such provisions the legislature had full power to and did impose conditions under which elections might be invalidated; *and where the proceeding is one involving a contested election, a prior conviction of the offenses named in Section 5175-26, General Code, is not required as a condition precedent to such invalidation.*"

Jones delivering the opinion of the Court quotes as a leading authority, "*Mason vs. The State Ex Rel. McCoy,*"

8 O. S., 30, and the following particular language of Judge Spear at Page 52 of "Mason vs. The State":

"A question much discussed is as to whether the state should be treated as imposing a *test of eligibility,* or as providing a method of removal. The matter may be not free from doubt. Possibly the provision involves both characteristics. But the better conclusion, we think, is that the intent of the legislature was, not to provide a method by which a person lawfully elected to an office may be removed therefrom, but rather a method by which the title of one to an office which he has obtained possession of in violation of the terms of the statute upon which his claimed right rests, may be inquired into. *It is, therefore, a challenge to the title to the office, resting upon charges of misconduct in procuring it,* rather than a process to remove, resting upon charges of misconduct in office."

And "*State Ex Rel. Bill vs. Etling,* 29 Kansas, 397."

In that case, the opinion was written by Justice Brewer, afterwards a member of the Supreme Court of the United States. And he says therein:

"The theory of popular government is that the most worthy should hold the offices. Personal fitness—and in that is included moral character, intellectual ability, social standing, habits of life, and political convictions—is the single test which the law will recognize. *That which throws other considerations into the scale,* and to that extent tends to weaken the power of personal fitness, should not be tolerated. ***It*** *tends to turn away the thought of voter from the one question which should be paramount in his mind when he deposits his ballot.* It is in spirit at least, bribery, more insidious, and therefore more dangerous, than the grosser form of directly offering money to the voter."

It is thus clear that the Jurisdiction of This Court has attached, and Petitioner is entitled to a Writ of Certiorari herein, and a hearing on the merits that, upon a final hearing on the merits, his rights under the constitution and laws may be adequately safeguarded.

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Petitioner.

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